Supreme Court of the United States.

No. 20.—October Term, 1903.

The United States, Plaintiff in Error, vs. The Denver and Rio Grande Railroad Company. } In error to the Supreme Court of the Territory of New Mexico.

[November 9, 1903.]

This was an action of trover brought by the United States against the railroad company for the value of certain logs cut upon the plaintiffs' lands. The declaration averred simply that the "defendant converted to its own use plaintiff's goods; that is to say, logs, lumber and timbers, . . . manufactured out of trees theretofore standing and growing upon certain lands of the plaintiff," therein described.

The defendant pleaded not guilty, issue was joined, the case tried before a jury, which was instructed to return a verdict for the defendant.

The case was submitted upon an agreed statement of facts, which showed that the New Mexico Lumber Company cut from the lands described in the declaration 2,100,000 feet of lumber, which was furnished to and received by the railroad company for its use.

Upon these facts, and proof of the ownership of the lands, and of the value of the lumber cut, the plaintiff rested.

The defendant also offered an agreed statement of facts, in which it appeared that it was the successor of the Denver and Rio Grande Railway Company, and that by act of Congress of June 8, 1872, (17 Stat. 339,) and amendatory act of March 1, 1877, (19 Stat, 405,) "the right of way over the public domain . . . and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line," was granted to the Rio Grande Railway Company, of which the defendant was entitled to the benefit. The amendatory act of 1897 merely extended the time for the completion of the railway from five to ten years, and is not material to this controversy. Defendant also offered testimony showing the appointment of the New Mexico Lumber Company as its agent for the cutting of such timber for the purposes mentioned, and that the lumber delivered to the railroad company was furnished upon specific orders given to the Lumber Company as its agents. There were other facts included in the statement which are immaterial upon this writ of error.

No testimony was offered by either party tending to show whether the timber cut from the lands and received by the defendant was required for the construction and repair of its railway and telegraph line.

The jury, under instructions of the court, returned a verdict of not guilty, and judgment was entered for the defendant, which was affirmed by the Supreme Court. (66 Pac. Rep. 550.)

The case was first tried in 1897, a verdict for plaintiffs returned, the case carried to the Supreme Court, which reversed the judgment of the court below upon the ground of erroneous instructions with respect to the burden of proof. (9 N. Mex. 382.)

Mr. Justice BROWN delivered the opinion of the Court.

As plaintiffs alleged simply a conversion of logs, and defendant pleaded the general issue of not guilty, plaintiffs made a *prima facie* case by proving their ownership of the lands, the cutting and asportation of the timber, its value and its subsequent possession by the defendant. Here they were entitled to rest, and did rest. They were under no obligation to put in the special acts of Congress, nor could defendant compel their introduction by them.

By the laws of New Mexico of 1889 certain forms of pleadings are prescribed, including forms of pleas in actions for wrongs, one of which is that the defendant "is not guilty of the wrong alleged," and another "that he did what is complained of by the defendant's" (mistake for plaintiff's) "leave."

Whether it was competent, under the plea of not guilty, to introduce the special acts of Congress in question we do not find it necessary to decide, but assuming that the defense could be made, it is clear that upon the introduction of the statute of 1872 it became necessary for the defendant to assume the burden of producing evidence tending to show that the public lands were adjacent to the right of way, and that the timbers cut were required for the construction or repair of its railway or telegraph line. This is not a question of pleading, but of the order of proof. There was a question of adjacency made in the court below which is not pressed here, and the case was argued substantially upon the question as to which party had the burden of showing the purpose for which the timber was cut.

Except in a single particular, hereinafter noticed, we think this case is practically controlled, with respect to the burden of proof, by that of the *Northern Pacific R. R. Co.* v. *Lewis*, (162 U. S. 366,) decided in 1896. That was an action against the railroad company for negligence in burning certain cordwood belonging to the plaintiffs. To prove ownership, plaintiffs showed that they had entered upon a portion of the unsurveyed lands of the United States, chopped about 10,000 cords from the timber hereon standing, and that after it was cut it was piled up near the rail-

road. For authority to cut the wood plaintiffs relied upon an act of Congress of June 3, 1878, (20 Stat. 88,) the first section of which authorized *bona fide* residents of the State to fell and remove, for building, agricultural, mining or other domestic purposes, timber growing on the public lands, "said lands being mineral and not subject to entry under the existing laws of the United States, except for mineral entry, . . . subject to such rules and regulations as the Secretary of the Interior may prescribe." Plaintiffs insisted that, in the absence of any evidence to the contrary, the presumption was that when they cut the timber they complied with and came under the conditions provided for in this act, and that the burden rested upon the defendant to show that the conditions mentioned in the act had not been complied with by them. The court held that if plaintiffs had acquired the right, by reason of a compliance with the statute, the facts should have been shown by them; that the presumption was that the cutting was illegal, and that the burden of proof was upon the plaintiffs to show the facts which brought them within the statute of 1878.

In *United States* v. *Cook*, (19 Wall. 591,) which was an action of replevin to recover possession of certain logs cut by Indians upon a reservation, and sold to Cook, it was held that the Indians, having only the right of occupancy, could not cut the timber for the purposes of sale, and that it was incumbent on the purchaser to show that the timber was rightfully severed from the lands.

The only feature distinguishing the case under consideration from that of Lewis is that the timber was cut, not by the defendant corporation, but by the New Mexico Lumber Company acting as its agent, and was subsequently furnished and delivered to the defendant. It is insisted that there is a presumption that the agent, having authority to cut, acted within the scope of his authority, and that this would of itself throw upon the plaintiffs the burden of showing that it had not. Although a presumption of this kind may attach to the acts of public officers, we know of no case holding that a party sued for a conversion by his agent may shield himself under a presumption that the agent acted within the scope of his authority. If the burden of proof would rest upon the defendant to show the cutting of timber for a proper purpose, evidently it could not shift that burden upon the plaintiffs by employing an agent to do the work.

Upon principle, as well as upon authority, a party who has been shown to be *prima facie* guilty of a trespass, and relies upon a license, must exhibit his license and prove that his acts were justified by it. The practical injustice of a different rule is manifest. It would require the plaintiffs not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose

upon the plaintiffs a difficult if not an impossible task to require them to show that the timber was not cut for the construction or repair of the railway, though evidence that it was so cut could be readily produced by the defendant. It is a general rule of evidence, noticed by the elementary writers upon that subject, (1 Greenl. Ev. sec. 79,) "that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party." When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative. (*Great Western R. R. Co.* v. *Bacon*, 30 Ill. 347; *King* v. *Turner*, 5 M. & S. 206.) Familiar instances of this are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of. (*Commonwealth* v. *Rafferty*, 133 Mass. 574; *Commonwealth* v. *Towle*, 138 Mass. 490.) As the license (the statute in this case) authorized the timber to be cut only for a specific purpose, and the means of proof, as to the purpose for which the timber was cut, were peculiarly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it.

This burden, however, which was simply to meet the *prima facie* case of the government, must not be confounded with the preponderance of evidence the establishment of which usually rests upon the plaintiff. (*Heineman* v. *Heard*, 62 N. Y. 448; *Willett* v. *Rich*, 142 Mass. 360; *Wilder* v. *Cowles*, 100 Mass. 487; *Central Bridge Company* v. *Butler*, 2 Gray, 130.) If this were a criminal case it would undoubtedly rest on the government upon the whole evidence to satisfy the jury beyond a reasonable doubt that the timber was not cut for the construction or repair of the railway.

While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ

was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances.

There was error in requiring plaintiffs to assume the burden of showing that the timber was not cut for purposes of construction or repair, and the judgment of the Supreme Court is therefore reversed, and the case remanded to that court with instructions to order a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.